

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

Northern Illinois Gas Company d/b/a	)	
Nicor Gas Company	)	
	)	Docket No. 10-0567
Petition pursuant to Rider 29 of Schedule of	)	
Rates for Gas Service to Initiate a Proceeding to	)	
Determine the Accuracy of the Rider 29	)	
Reconciliation Statement	)	

**REPLY BRIEF  
OF THE PEOPLE OF THE STATE OF ILLINOIS  
AND THE CITIZENS UTILITY BOARD**

**February 16, 2012**

## **TABLE OF CONTENTS**

<b>I. INTRODUCTION .....</b>	<b>2</b>
<b>II. THE BOARD HAD AUTHORITY TO APPROVE OR DISAPPROVE EXPENSES... 2</b>	
<b>III. THE EXPENDITURES AT ISSUE SHOULD BE DEEMED UNREASONABLE AND IMPRUDENT BECAUSE THE BOARD DID NOT APPROVE THEM. ....</b>	<b>6</b>
<b>IV. CONCLUSION .....</b>	<b>7</b>

## **I. INTRODUCTION**

The sole disputed amount in this case between Northern Illinois Gas Company d/b/a Nicor Gas Company (“Nicor” or “the Company”) and the Citizens Utility Board (“CUB”)/People of the State of Illinois, through the Office of the Attorney General (“AG”) consists of \$108,375, monies paid to outside consultants for Nicor’s Energy Efficiency Plan (“EEP”). The Illinois Commerce Commission (“Commission” or “ICC”) should disallow these consultant costs because the stakeholder Advisory Board (“Board”), the body the ICC specifically directed to oversee the EEP, rejected these expenses. Nicor now seeks recovery of these expenses despite the Board’s actions, and this request should be denied.

On November 3, 2009, the Board approved the 2009 EEP budget **except** for the Request for Proposal consultant expenses, which include the work done by KO Solutions and Bass & Company. During the next Board meeting on November 18, 2009, Nicor moved for approval of the RFP consultant expenses and the Board members present took a vote on the motion. Nicor and Commonwealth Edison Company voted for the motion, CUB and AG voted against the motion, and the Natural Resources Defense Council (“NRDC”) abstained from voting. The motion did not receive enough votes to pass and was thus rejected by the Board. Since the Board, which had express authority over Nicor’s energy efficiency program expenditures, rejected approval of these expenses, these costs should not be recovered from Nicor customers.

## **II. THE BOARD HAD AUTHORITY TO APPROVE OR DISAPPROVE EXPENSES.**

The Commission created the EEP with oversight of the program initially governed by a stakeholder Board. In its Initial Brief, Nicor argued that the Board did not need to expressly approve expenditures in order for them to be recovered. Nicor In. Brief at 12. Nicor further argued that CUB/AG fails to cite any statutory authority, Commission rule, or Order that requires

such approval and that the Commission expressly limited the authority of the Board because the Commission stated, “the Advisory Board will be determining what programs best suit ratepayers in Nicor’s service territory. It will also commence the process of setting up those programs.” *Id* (quoting ICC Docket No. 08-0363, Final Order at 162). This argument by Nicor is not only incorrect, but purposefully misleading as Nicor based it on an out-of-context partial quote of what the Commission stated. In fact, the Commission stated:

[W]e would be remiss in our duty to protect ratepayers from imprudence and malfeasance if we allowed Nicor to take \$13 million from those ratepayers without any way to recover those funds, if they were to be imprudently spent. We conclude that some sort of compromise between the two positions and that of Nicor is in order.

Logically, in the beginning the Advisory Board will be determining what programs best suit ratepayers in Nicor’s service territory. It will also commence the process of setting up those programs. Thus, the funds spent during this period of time would largely be on setting up energy efficiency programs. Therefore, in the beginning of the program there is less risk of imprudent or malfeasant expenditures. We also note that Nicor’s plan is structured so that it may carry over 75% of the funds from the first year to the second year of the Plan. This is some indicia that Nicor anticipates that it may not actually be spending all of the funds during its first year. Allowing Nicor’s proposed structure, at the beginning, permits Nicor to get its programs “up and running” with less chance of a compromise to the ratepayers’ right to refunds of imprudently spent funds.

However, after the first fiscal year (December 31, 2009) Nicor shall reconfigure its Advisory Board in such a manner so that it shall have total financial responsibility for any expenditure made pursuant to its Energy Efficiency Plan. On January 1, 2010, Nicor’s Advisory Board shall do what its name implies; it shall act solely in an advisory capacity.

Final Order at 162-3, ICC Docket No. 08-0363 (emphasis added).

Nicor misleadingly abstracted only a small part of that directive in its Initial Brief from the rest of the Commission’s orders regarding the Board. In doing so, Nicor attempted to argue that because the Commission directed the Board to determine and set up energy efficiency programs, the Commission intended the Board to only do these two things. This is not the case.

As is obvious from the full quotation of the Commission's Order, the Commission intended the Board to have more than those two duties. The Commission intended the Board to have oversight of Nicor's expenditures as it felt that it "would be remiss in our duty to protect ratepayers from imprudence and malfeasance if we allowed Nicor to take \$13 million from those ratepayers without any way to recover those funds, if they were to be imprudently spent." ICC Docket No. 08-0363, Final Order at 162.

In creating the Board, the Commission also specifically contrasted the Board's role in 2009 with that of the advisory groups that participate in the electric utilities' energy efficiency dockets, which "merely advise." The Commission stated that if the Board in this case were to do the same, this would "delay implementation until the winter heating season of 2010. Such a delay compromises the efficacy of Nicor's program." Final Order at 162, ICC Docket No. 08-0363. If the Commission expected the Board to be "solely" advisory in 2010, it is clear the Commission intended a different role for the Board in 2009. The Final Order makes clear that the Commission intended the Board to act in a manner that would decrease the risk of imprudent or malfeasant expenditures. The Commission specified in its order that after December 31, 2009, Nicor shall reconfigure the Board so that Nicor has "total financial responsibility for any expenditure made pursuant to its Energy Efficiency Plan" and that the Board after that point "shall act solely in an advisory capacity." *Id* The fact that the Commission specifically stated that Nicor was to reconfigure the Board in this way clearly shows that the Commission did not see the Board as already giving Nicor total financial control in 2009. Instead, the Commission saw the Board as having financial control over expenditures in a way that Nicor was not to have in 2009. .

The record shows that the Board incorporated as a 501(c) not-for-profit corporation and approved bylaws on November 3, 2009 that state the purpose of the Board as overseeing Nicor's implementation of energy efficiency programs. CUB/AG Ex. 1.1 at 1. These bylaws also

expressly stated that the Board understood its duties to include oversight and approval of a budget for 2009. *Id.* at 3. The Board as a whole, of which Nicor is a member, adopted these duties. Nicor participated in the development and adoption of these bylaws. Nicor cannot now disavow the Board's authority simply because a subsequent vote by the Board did not proceed the way Nicor wanted it to. Nicor's adoption, as part of the Board, of bylaws giving the Board approval duties over the 2009 budget was not limited only to situations where the Board votes the way that Nicor wants, and the Commission should not allow Nicor to now fabricate such a limitation.

Nicor also noted in its Initial Brief that even though it did not believe the Board needed to approve EEP expenditures, it nevertheless made efforts to make the Board aware of Nicor's work with the consultants. Nicor In. Brief at 13. Nicor argues that "there can be no question that the Advisory Board was well aware of the work that both KO Solutions and Bass were doing with respect to the EEP." *Id.* First, it bears noting that a significant portion of the consultant expenditures was incurred before the Board ever convened. CUB/AG Ex. 1.0 at 3. Second, CUB/AG does not dispute Nicor's assertion that after the Board convened, the Board was aware of the work that the consultants were doing. But rather than serving as a reason for the expenditures to be recovered as Nicor argues, CUB/AG sees the Board's awareness of what work was being done as actually providing another reason to support *disallowance*, when seen in light of the Board's subsequent rejection of the expenditures after it became aware of the work being performed.

Therefore, the Board's awareness and subsequent rejection of the consultant expenses, the clear Commission authority giving the Board financial oversight of program expenses during 2009, and the Board members' own agreement that their duties included budget approval clearly

supports CUB/AG's position that Nicor is barred from recovering consultant expenses for which the Board has rejected such recovery. In contrast, Nicor's only relevant evidence of its position is a partial and out of context quote that, contrary to Nicor's argument, does not actually limit the Board's approval authority. Nicor In. Brief at 13. If the Commission were to allow Nicor to recover these expenses, it would not only be thwarting its own intent in creating this Board in its Final Order in Docket 08-0363, but it would be going against the overwhelming evidence supporting CUB/AG's position.

### **III. THE EXPENDITURES AT ISSUE SHOULD BE DEEMED UNREASONABLE AND IMPRUDENT BECAUSE THE BOARD DID NOT APPROVE THEM.**

Nicor argues in its Initial Brief that the consultant expenditures were prudent and reasonable. Nicor In. Br. at 10-12, 14-16. As already discussed at length in CUB/AG's testimony and Initial Brief, at the time of the vote, the AG and CUB believed the funds were imprudently spent and that the amounts charged were unreasonable. *See* CUB/AG Ex. 2.0 at 3-5; CUB/AG In. Brief at 7. The fact that the Board rejected their approval makes them imprudent and unreasonable. For purposes of this docket, however, the issue is whether the Commission gave the Board the authority to approve expenditures or not.

Similarly, Nicor's argument in its Initial Brief that the problems the EEP faced were due to the Board's fault rather than that of the consultants is also not at issue in this docket. While CUB/AG believes that the delays and problems in establishing the EEP were in fact caused by the consultants, fault for the delays is not an issue for the Commission to determine under the present docket. The only issue for the Commission to decide in the present docket is whether the Board had the authority to approve expenditures or not. Since the Board did indeed have approval duties, as discussed above, the fact that the Board deliberately rejected a motion to

approve the expenses suffices to disallow the expenses.

Nicor also argues in both its testimony and Initial Brief that the Board's failure to pass the motion approving the expenditures does not amount to a rejection of the expenditures. Nicor Ex. 6.0 at 12; Nicor In. Brief at 15. As explained in CUB/AG's Initial Brief, when a motion is required to approve expenditures and the Board does not reach the majority required to pass the motion, this means that the Board as a whole is rejecting those expenditures. Of the five Board members present, two voted for the motion and two voted against the motion while the fifth, NRDC, abstained from voting. Even if there were only four members present and the vote was simply two against two, the expenditures would still have been rejected because the Board would not have passed the motion with the required majority. But in this case, it is even more compelling that the Board as a whole expressly rejected the expenditures because NRDC abstained from supporting the motion. While the overall effect of NRDC's abstinence is the same as it would have been had NRDC not been present for the vote, the fact that NRDC was indeed present and chose to abstain from the issue is further support that the Board as a whole did not approve of the consultant expenses.

#### **IV. CONCLUSION**

For all the reasons set forth above, CUB/AG respectfully request that the Commission enter an Order consistent with the recommendations made in this Brief.

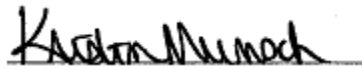


Respectfully Submitted,

By: \_\_\_\_\_



PEOPLE OF THE STATE OF ILLINOIS  
Cathy Yu, Assistant Attorney General  
100 West Randolph Street, Floor 11  
Chicago, Illinois 60601  
Telephone: (312) 814-8496  
Fax: (312) 814-3212  
Email: [cyu@atg.state.il.us](mailto:cyu@atg.state.il.us)



CITIZENS UTILITY BOARD  
Kristin Munsch, Attorney  
Christie Hicks, Attorney  
309 W. Washington, Suite 800  
Chicago, IL 60606  
(312) 263-4282  
(312) 263-4329 fax  
[kmunsch@citizensutilityboard.org](mailto:kmunsch@citizensutilityboard.org)  
[crhicks@citizensutilityboard.org](mailto:crhicks@citizensutilityboard.org)

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